IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

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KICKFLIP, INC.,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

: CIVIL ACTION

: NO. 12-1369 (LPS)

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Wilmington, Delaware
Monday, July 29, 2013
Oral Argument Hearing

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BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

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APPEARANCES:

MORRIS JAMES, LLP
BY: KENNETH L. DORSNEY, ESQ.

and

NEWMAN DuWORS, LLP
BY: DEREK A. NEWMAN, ESQ.
(Seattle, Washington)

and

STRANGE & CARPENTER
BY: BRIAN R. STRANGE, ESQ.
(Los Angeles, California)

Counsel for Kickflip, Inc., d/b/a Gambit

APPEARANCES: (Continued)

ASHBY & GEDDES, P.A.
BY: STEVEN J. BALICK, ESQ.

and

COVINGTON & BURLING, LLP
BY: THOMAS O. BARNETT, ESQ.,
JONATHAN GIMBLETT, ESQ., and
CAITLIN COTTINGHAM, ESQ.
(Washington, District of Columbia)

and

FACEBOOK, INC.
BY: PANKAJ VENUGOPAL, ESQ.
(Washington, District of Columbia)

Counsel for Facebook, Inc.

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P R O C E E D I N G S

(REPORTER'S NOTE: The following hearing was held in open court, beginning at 10:08 a.m.)

THE COURT: Good morning, everyone.

(The attorneys respond, "Good morning, Your Honor.")

THE COURT: We'll start by having you putting your appearances on the record for me, please.

MR. DORSNEY: Good morning, Your Honor.

THE COURT: Good morning.

MR. DORSNEY: For plaintiff, Kickflip. Ken Dorsney from Morris James. With me at counsel table, Brian Strange from Strange & Carpenter.

MR. STRANGE: Good morning, Your Honor.

MR. DORSNEY: And Derek Newman from Newman DuWors.

THE COURT: Good morning to you.

MR. NEWMAN: Thank you.

MR. BALICK: Your Honor, good morning.

THE COURT: Good morning.

MR. BALICK: Steven Balick from Ashby & Geddes for the defendant, Facebook. From the Covington & Burling firm, I'm joined from by Thomas Barnett, Jonathan Gimblett, Caitlin Cottingham, and in the front row from Facebook is Pankaj Venugopal.

THE COURT: Welcome to all of you. So we are here for argument on two motions. We have the motion to dismiss as well as the motion to strike. To the extent you want to say anything about the motion to strike, feel free to do so but work it into your presentation on the motion to dismiss.

So we'll hear first from the defendant in that regard.

MR. BARNETT: Thank you, Your Honor. Thomas Barnett.

I guess if I can ask, as an initial procedural matter, I think you allocated an hour to each side. If it's possible, I'd like to be able to reserve maybe 15 minutes or so for rebuttal.

THE COURT: That's fine.

MR. BARNETT: Assuming that is needed. But I promise not to -- at least try not to talk for longer than necessary.

THE COURT: Okay.

MR. BARNETT: As I think you probably are aware from the briefs, from our perspective, this is a case about an advertising company that was serving false and deceptive ads, it was banned from the Facebook site in November of 2009, who is now trying to come back and convert that into an antitrust claim based on a policy that was adopted about 18 months later in the summer of 2011.

For the reasons that we have explained in our brief and then I will try to elaborate on some here, we believe that neither claims stand, neither the antitrust claims or the tortious interference claims. And,

We believe this is a good opportunity, or this

is exactly the sort of case that the Supreme Court was talking about in *Twombly* when it said, "It is particularly important to apply rigorously the standards of pleadings to make sure that there is a plausible claim before you open the floodgates."

Make no mistake that what the plaintiffs are seeking here would be a very burdensome intrusive expensive enterprise. And while they're held to the same standards as everybody else, it is important that they allege a coherent theory and facts that support that coherent theory that make their claim plausible. And we think what they have done is actually assert a set of vague allegations that, when pressed, end up or turn out to be shifting grounds that do not provide a solid support for moving forward.

So let me spend just a moment to talk a little bit about Facebook and Kickflip to set the background. I'm cognizant this is a motion to dismiss and, in general, are confining ourselves to the allegations in the complaint. For the most part, I am going to be referencing attachments, if you will, that are not challenged by the plaintiff in terms of the motion to strike. Where I do so, I will try to be explicit about that.

The one exception to that I think will be the Facebook platform policies and the development of payment policies which are both explicitly referenced in the

complaint. There is an URL cited to those policies in the complaint and those policies were attached to our motion to dismiss.

THE COURT: Let's talk about that for a minute. So as I understand it, if I were to follow the precise URL that is in the complaint, I would, today, find the version of the policy that you have attached to your motion to dismiss; is that correct?

MR. BARNETT: Well, I would say at the time we filed our motion, that would have been correct. If you followed it today, it may well be different.

THE COURT: So I guess that is really the question. What is in the record as to what I would have found at the time the complaint was filed, had I clicked on that URL?

MR. BARNETT: I believe at the time the complaint was filed and the time we filed our motion, it would have been the same policy.

THE COURT: For purposes of a motion to dismiss and a motion to strike, do you think that whether the Court can look at the policies turns on what date one might click on an URL that is in a complaint?

MR. BARNETT: Well, I think it's reasonable to say that the plaintiff cited in their complaint at the time they filed it to a specific policy that was available at the

time. We pulled it down and that is available.

You know, in this world, I'm not sure how you can ensure that something is continuously available. There may be ways in which you can access some of these things, but at the end of the day you have our statement that we pulled this down at the time and attached it.

THE COURT: But you wouldn't argue that you all control Facebook and that URL, if you, today, put your whole responsive brief and an expert report defending this case at that URL, you wouldn't say that suddenly I can look at that for purposes of a motion to dismiss just because the complaint is linked to that URL, would you?

MR. BARNETT: No, I would not. But I would also point out that I don't think the plaintiffs have suggested that there is anything in those policies that is any different from what they understood them to be at the time they filed the complaint. And I would certainly not go as far as that.

So what is Facebook? Facebook at a general level is, it's a website. It allows users to register or create a profile and essentially exchange information with each other, either about themselves or other issues. And it's a way to connect with each other.

In addition, Facebook provides a platform, if you will, that allows developers to develop applications.

For example, a game might be one application. And they are allowed to access certain functionality from Facebook through the APIs -- the Application Program Interface -- and by doing so, they can connect to Facebook. And I won't go into all the details about what that is, but I think at a general level it's fair from the complaint that that is what developers are doing. They're connecting through Facebook through certain APIs. And,

Facebook itself, there is no allegation that Facebook, for example, provides games on its own. This is something it provides to developers. And other than this payment processing fee that we will get to, there is no allegation that Facebook charges anybody, any of the developers for access to this site.

Kickflip, from what we can tell, we don't have a lot of details, were largely an advertising company. They were doing something called offer ads. And offer ads enable the developer to, if they use the Kickflip or Gambit service to post an ad, that the user could click on and do something and get something of value for that.

Kickflip claims or asserts or alleges that it also provides other services such as in-app currency. And what is that? That means if I'm playing a game, I have gold coins that I can use to pay for things in the game. That is referred to as an in-app currency, and they would help

developers provide that.

They provide something called pricing optimization services. How do you price things in a way to optimize your revenue? Payment processing, which is the function of I'm a user, I want to buy something, how do I actually execute that exchange of value between the developer and the user? Which is obviously an important point we'll come back to.

In the fall of 2009, again this is in the complaint, Facebook encountered something that has been referred to as Scamville that is related to these offer ads. And this was a problem because when users were clicking on these offer ads, they were being tricked into or deceived into paying more than they thought they were going to pay or possibly giving up personal identifiable information.

If you look at, I believe it is Exhibit 6 to our motion to dismiss, which is one of the articles referenced in the complaint in which the plaintiffs have not challenged in their motion to strike, it suggests that 20 percent of the offer ads that were appearing at that point in time willfully tricked users. And this was an estimate from the companies providing the ads, as I recall the article. So the suggestion that this was not a serious issue is not plausible given the facts even as alleged in the complaint.

Kickflip, and it does not deny this, was one of

the offenders that was serving up these deceptive fraudulent ads. Facebook, to protect the integrity of its site to protect its users -- remember, if users don't trust the Facebook site they won't use it -- took action to ban Kickflip from the site.

In a November 5th, 2009 letter, which is referenced in the complaint which the plaintiffs do not seek to strike, Facebook sets forth explicit reasons why Kickflip was being banned from the sites: Despite repeated warnings, you are continuing to serve ads that violate our policies and, as a result, you are banned from the site.

Again, I think it's critical to this motion that there is nothing that Kickflip has suggested that suggests they were not in fact serving fraudulent and deceptive ads.

THE COURT: Let's talk a little bit about that. Because the allegation, as I understand it from Kickflip, is that all of this is pretext for your attempted monopolization. Is it your view that if the facts as you have just asserted them about Scamville and Kickflip's role in that are correct, then even if you had monopolization or even if everything else that the plaintiff alleges is true, they still don't have a claim?

MR. BARNETT: Well, I could make an argument that we had an independent and sufficient reason for kicking them off the site, whatever else we may have been doing.

But the argument, I think a more narrow argument that I would like to focus you on is they need to allege specific facts that suggests a linkage between their being kicked off the site and this supposed monopolization scheme. We'll get to the plausibility of the monopolization scheme, but let's assume for the moment there was something going on out there.

Merely asserting that this was part of this broad scheme, it flies in the face of *Twombly*. They need to allege facts that suggest that there was in fact a linkage between the two. And I would suggest to you they have failed to do so.

Start with the basic notion that, remember, these were offer ads that we're talking about. These were ads that developers, in their application or games or wherever else they would appear, people that click on them would be deceived.

The policy that they are challenging, that was adopted 18 months later, is a payments processing policy. It's actually a very narrow policy. And all it says is that in terms of you can use whatever in-app currency you want. You are not required to use Facebook's credits or anything like that. But when you do the exchange of value, you have to run through our back-end and Facebook is going to take a fee when you do that.

Now, Facebook was doing this certainly to ensure -- I mean the exchange of value on a website is obviously a very important function. And if people are not getting what they expect, if they're deceived, et cetera, that causes problems for Facebook more generally.

As is alleged in the complaint, others in the industry, in the Internet industry such as Apple, do similar things. They require you to go through that payment processing, that narrow function so that they can have some control over the reliability, safety and security of it.

That policy has nothing to do with offer ads. It is separate. And they need to allege some fact that says banning a company in November of 2009 for putting deceptive offer ads up has some logical connection to a payment processing policy adopted in July of 2011 that is unrelated to offer ads.

Now, they try to link those in some way. First of all, through -- well, in several ways. First, they say this was a sham. You know, there was no good reason for it. And the reasons they give are, in their opposition at least, they say we weren't responsible for these ads. It was the advertisers who were doing it.

But if you look at the complaint, they contradict their own complaint. In the complaint, they say we were -- they acknowledge they should have been aggressively monitoring

these ads -- the ads that they were serving up on Facebook's site.

And they are the logical place, if you are going to look for responsibility, not the hundreds or thousands of companies that creates ads but the relatively few companies that are serving them up on Facebook's site, that you would go after. So the suggestion in their opposition that they were not responsible is not, certainly contradicts the complaint and is not credible or plausible.

THE COURT: And that is enough for me to dismiss the allegation that this was all a sham?

MR. BARNETT: That is part of it.

THE COURT: Okay.

MR. BARNETT: Second. I'm going through the reasons that they give for why you think it's a sham. They say, well, Facebook should have focused on the developers and the advertisers. I have already talked about the advertisers which are many and diffuse.

The developers, they did talk to the developers. That's in the complaint. Indeed, they complained that we talked to the developers and said Kickflip is serving up deceptive and fraudulent ads. You can't use them.

So the idea that we were not focused on developers is again contradicted by the complaints.

I come back to under *Twombly*, if you think about

the facts in *Twombly*, which were that the various regional Bell operating companies after the deregulation didn't enter each other's territories. And Justice Souter, when he writes *Twombly*, he says, look, there were obvious reasons why they wouldn't enter each other territories. You plaintiffs have to allege specific facts that suggest that's not the reason that there was an antecedent collusive horizontal agreement that was the reason.

Here, the reason that Scamville is so important is there were very clear facts that Facebook put to Kickflip at the time as to why it was banning it from Facebook. They need to come forward with more than just supposition or raw assertion that suggests that this was part of some scheme for a different product in a policy that was adopted 18 months later. That, I would suggest to you, is a reason why this complaint can be dismissed.

THE COURT: What about the alleged timing? Isn't it alleged that this credits program preceded the letter even to Kickflip?

MR. BARNETT: It's alleged that Facebook developed payment processing and developed a credits option -- a credit being its own version of an in-app currency. But it is not alleged that Facebook adopted a policy until July of 2011 that, first of all, if you look at the policy, only deals with payment processing. It

doesn't deal with the in-app currency.

Developers have, and always have been, are today able to use their own in-app currency. Could use, if Kickflip hadn't been banned, could use Kickflip currency. But because they were banned for that independent reason 18 months before, they're one of the few companies who cannot do that.

THE COURT: Well, why don't you focus me on why it's implausible when the timeline is you all introduced credits, then you start enforcing this policy about ads and then you subsequently, 18 months later, I suppose, have a policy that effectively says you have to use credits and now you are able to charge three times as much as everyone else who used to do this. Why is that implausible?

MR. BARNETT: Well, first of all, I want to underscore the distinction between the creation of payment processing and of credits and the offer ads. Those are different. So if I can use a rough analogy, I guess, if I go rob a bank and then I am fired and you later find out that I'm embezzling or something, they're unrelated events and the fact that they may have overlapped in time to some extent doesn't mean that they are connected.

THE COURT: Sure. But I think the allegation as I understand it is your client was going to take over this market, one way or another, and whatever they could do

to bloody the competitors along the way, they were going to do. And so each step along that way, maybe each step looks separate, maybe you will prove that, but it's not implausible to think that you start taking some cuts out of the competition along the way to where you finally hit on the policy that knocked them out at the end.

MR. BARNETT: But I would suggest that those cuts really need to be connected in some way to the credits or the payment processing whereas this cut that we're talking about had to do with offer ads which are different. We'll get to their cluster market concept but they're different and there is no logical connection between those two other than the fact that they may have -- they happened to be providing both.

It's an assertion that this was part of some grand scheme, but there are no actual facts that explain why banning somebody for serving fraudulent deceptive ads is going to help Facebook, if you will, discredit the payment processing industry, if you will, which was just different from the offer ads industry.

THE COURT: Well, I will give you time to break it down, but it seems like you are saying a number of different things. Maybe they haven't adequately pled the overall scheme, but for you to say you would suggest that they have to be linked and logically related, I'm not sure where you are

getting that. What is the authority for saying they have to be logically related if they have adequately pled an overall scheme just to get rid of us, however it is going to be done?

MR. BARNETT: It goes to the causation of a standing point. If, for independent reasons, they have legitimately been banned from Facebook, then they are not harmed by whatever happened 18 months later. And this goes to I guess maybe one of your original questions. If you have that and it is independent, then they can't trace the harm to the alleged antitrust violation. And they wouldn't -- the remedy in the antitrust case wouldn't remedy their situation as we would still have an independent reason to keep them off of Facebook. That is why there needs to be the linkage.

THE COURT: Well, I have thrown a lot at you. You go in whatever direction you think will be most effective.

MR. BARNETT: That's fine. Well, on this point, I want to deal with the plaintiffs make the argument on a causation point that their harm, if you will, is overdetermined and they seek to rely on the *Khodara* case.

I would suggest to you there what was motivating the Third Circuit was a Catch 22 situation where in either one, the plaintiff tried to challenge either of the two causes. In each case, the other could point to the other way and say there are two causes. You don't have standing

to pursue either one.

This is fundamentally a different situation. We're not suggesting that they don't have standing to bring their tortious interference claim relating to their being banned in November of 2009. The payments policy indeed doesn't even address the whole offer ad issue. As I said, it's separate. So this isn't a question of interdependence in such a way, and so you don't have that same Catch 22.

We do make arguments as to why their tortious interference claim doesn't state a claim, but it's not a standing argument.

Let me move to, if you will, some of the more substantive aspects of their antitrust claims.

As I said, they need to allege a coherent theory and a set of facts to support that theory that makes the claim plausible. It's very clear under their monopolization claims to start with that they need to allege coherent relevant markets relying upon cross-elasticity of demand substitutability that support the existence of their alleged relevant market.

I would suggest to you first off that their virtual-currency services market is less than coherent and certainly not sufficient at the pleadings stage.

As an initial matter, I will readily confess I still don't understand exactly what is supposed to be in or

not in this "virtual-currency services" market. I get some of what is supposedly included:

Payment processing, obviously, since that is the policy that they're challenging.

I think in-app currency is supposed to be included, but that is not entirely clear to me.

Pricing optimization, relationships with advertisers, those sorts of things that are mentioned. It's again unclear to me whether they intend to include all of those or other things.

What they say in their opposition is it's not any one thing, it's a cluster market. And that is a known concept. If you go back to *Philadelphia National Banks*, Supreme Court's decision back in the early 1960s, they accept the concept of a possibility of a cluster of products or services can constitute a single product market.

But there are specific requirements before you can support such a market. Specifically, what you have to allege is people won't buy the component members of that cluster separately. They will only buy them in the cluster. Therefore, it's proper to treat them as a cluster.

What is completely clear is the complaint not only doesn't allege facts that suggest that the game developers will only buy these things in a cluster, it even alleges facts that tends to contradict that.

As an example, some of these products that they include in their cluster market, Facebook is not alleged to provide. They acknowledge that Facebook's payment processing is a very limited service. Even the credits, in-app currency option that is available is a more limited option.

So you have got a provider, based on the complaint that is specifically alleged, who is not selling all of these things. Developers are obviously getting the rest from other people.

But, more fundamentally, they don't allege facts and say, look, they only buy this way and not another way. So until they clarify -- and they can't do this in the papers, they need to do it in the pleadings -- clarify exactly what is and is not in this virtual-currency services market that they talk about and then add facts that indicate that cluster does constitute a single market, that is a grounds for dismissing the antitrust claims.

Now, once you -- if the cluster market, and I would suggest there are two reasons why -- I mean they can tell you why they're trying to group them together, but the reason that leaps out to me is they understand that the offer ads that we were talking about that were false and deceptive that got them into trouble were different from the payment processing that was affected by the July 2011

policy. And this is part of their effort to try to link them in some way.

But they have to allege facts to support the cluster market in order to establish the link in that manner. And I would suggest to you the complaint has not done that.

Now, if you're just looking at payment processing, it becomes particularly problematic for the plaintiff because if you think about what that involves, that is simply getting value from the user to the developer, whoever is running the app through the various forms of payment that you have available. That happens all the time on the Internet. It happens on Facebook certainly. But any site where there is commercial transactions taking place, there is a payment processing function that goes on. There is nothing that suggests that piece of it is particularly unique to this situation. So if you are talking about payment processing, you are talking about a very broad market which obviously the plaintiff would like to avoid.

Another problem that they run into is -- and I want to underscore this -- they try to include this constellation of services, if you will, within one product market, but then challenge a policy that only affects payment processing. There is nothing in the July 2011 policy that says somebody can't serve offer ads, can't serve two price

optimization services, can't provide in-game virtual-currency services, basically any of the other things they want to include in there. So there is a mismatch, if you will, between the policy that they're challenging and the various services that they claim they're going to provide.

On a separate point, they want to establish a market for games played on social networks. This is obviously very important to them both for their monopolization and their tying claims, all of their antitrust claims. But, ultimately, all they really have is a series of assertions that these are somehow unique. They talk about a different monetization strategy that if I'm an app developer, I develop a game and I put it on the Xbox and Playstation 2 platform, I can charge a fee for it upfront. And on Internet games, there tends not to be an upfront fee. And I monetize, if you will, on the back end.

That doesn't mean from the developers' perspective that they can't put games on both kinds of platforms. And I would suggest to you that there are three kinds of other platforms that are relevant here, and they really only take into account one.

The first is social networks. And even here, this is the one that they tried to take into account. Even here they're inconsistent. In the complaint they say, well, games that are played on social networks, like Facebook or

Google+ or Myspace. If you look at their opposition, they now claim that they're only talking about games that are on Facebook. Games that are on another social network or even games that are on another site that connect to Facebook, they try to exclude from their relevant market. But, again, they have no facts alleged that support such a distinction.

That leads me into the second category, which is other websites. You don't have to be a social networking site to put up a game. Remember, Facebook has lots of games on it. Some of them, you interact with each other in the game. Some of them, you don't interact with each other on the game. Certainly, the latter category you can put on any website. But even games where you interact with other players in the game, if you will, a social aspect to that, they exist on other websites. You don't have to be part of or connected to a social network to have such a game. And there is nothing in the complaint that says. Even the similar games that appear on Facebook do not appear on other websites.

Similarly, for the third category, for these other platforms, people play with each other all the time. And, again, there is nothing in the complaint that tells you whether games that appear on Facebook do not appear on these other platforms. They have failed to allege that, and that is critical because these are obvious alternatives that they

have not alleged facts to exclude, and without that, you don't have a coherent relevant market so they're done in the first instance, and you certainly don't have a basis for inferring that it's plausible that they can establish market power in the other elements of the complaint.

THE COURT: So even on a motion to dismiss with allegations here, it would be wrong for me to draw the inference in their favor that there are some games that are only available to folks through Facebook?

MR. BARNETT: I mean if there are some games that are only on Facebook, that doesn't establish a relevant market. They have to allege facts that there is, if you will, a business. And from the game developers' point of view, they may choose to only put it on Facebook. They could have put it on Google+ or another website or even on Playstation 2. And for all we know from the complaint, they do do that, but the fact that, you know, some developers for some games have chosen a single distribution outlet doesn't establish a relevant market.

If I am a clothing manufacturer and I only sell to one set of retailers but not another set of retailers, that doesn't mean there is not a retail clothing market that is going on. That is just my individual choice.

If there are other game developers, what they would need to show is that for all of these developers, they

are only able to put these games on Facebook. If you look at what is in their opposition, if you look at what is in their complaint, they would need to show it's on Facebook or Google+ or other websites. But they have not alleged that.

THE COURT: Isn't the test, we're at the very beginning of the case. The test is whether their market is facially unsustainable as alleged. How could I reach that conclusion from what your argument is?

MR. BARNETT: Because, and the courts have held, even in a 12(b)(6) motion to dismiss context, if they are not addressing obvious other alternatives and alleging facts as to why those alternatives aren't substitutable here, then the complaint fails on its face.

And to take a simple fact. The fact that they have not alleged that these games do not appear on other sites is a pretty telling omission.

THE COURT: Do you oppose granting leave to amend?

MR. BARNETT: No.

THE COURT: Do you think the analysis of the two markets rises and falls together or might we find that they have adequately alleged one market but not the other?

MR. BARNETT: I would put it slightly differently. There are different reasons why we think they have failed to allege adequately the two markets. Therefore, I think you can make an independent decision on each of those, which I

think is responsive to your question.

THE COURT: Yes. Thank you.

MR. BARNETT: So I also want to step back and talk about -- well, let me go to the -- yes, step back for a moment on this whole monopolization front. The entire -- one of the elements of *Twombly* is what is going on here plausibly.

The whole story that they're trying to tell is that Facebook has monopolized this virtual-currency services market. There are fundamental problems with that. The first of which we already alluded to, which is Facebook doesn't even provide or is not alleged to provide many of the services that they allege that we have monopolized, which makes it pretty hard for us to monopolize them.

The second is, it's just a matter of common sense. They talk about Facebook's ability to charge a fee, a 30 percent fee of these transactions that take place.

Put most simply, Facebook, all Facebook would have to do, if it wanted to charge a fee, was just charge a fee. Say, any transaction that takes place on our site, you have to give us 30 percent. They could do that.

What they have done is something related to this payments processing that has to do with the integrity, safety and reliability of the site. And they're trying to shoot -- now, they are monetizing off of that. Perfectly

reasonable thing for a company to do, because otherwise this is all free for developers, and Facebook spends a lot of money developing these things that the site is making available.

But if all they wanted to do was earn money, they don't need this grand scheme. And I suggest that that goes to the plausibility as to whether Facebook launched on the grand scheme that they talked about.

On the time front here, there are several points that I want to underscore.

The first is you have to have a time. As I pointed out earlier, for many of the products that they are talking about in this virtual-currency collection, the payments policy doesn't affect that. Anybody who is not banned from Facebook for other reasons can generally provide those. Therefore, there is no tie with respect to these other products.

But the second point is a point that is just not dealt with in the complaint or frankly in the opposition papers, and that is if you look at the platform policy, that deals with the payments processing policy. It says if your game is on Facebook, you are subject to this policy, and any transaction that goes through your sites is going to have to go through our back-end system and we'll take our fee. But if you are off of Facebook and you access the site through

plug-ins and log-in and publishing and news feed, you are not subject to that policy. Therefore, in order to "access Facebook" in some way, the policy simply doesn't cover that. There is an alternative means and there is nothing in the complaints and there is nothing in the opposition that gives you a reason to believe, even accepting facts alleged as true, that that doesn't exist or doesn't work. So there is no tie at a very fundamental level. And they have simply not addressed that.

The final point -- well, two final points to make on this front is, when we talked about what Facebook is, with respect to developers, it is really just a series of APIs. Access to certain functionality. Obviously, people can't have access to the entire site. If they have access to too little functionality, it's not going to work.

So there is an evolution that goes on in terms of what is the appropriate set of API interfaces that is going to work for developers. Facebook obviously determined as the complaint alleges, as have others in the industry, that this payment processing facility is an important part of the APIs that should be available and used by developers.

That evolution, I would suggest to you, is just part of the Facebook platform, if you will. It's not a separate product. But even if it is, that underscores the notion that in this context, it would not be appropriate to

apply the "per se" rule. It would be appropriate to follow the D.C. Circuit when it looked at another online antitrust case and decided the rule of reason was more appropriate.

THE COURT: But the response to that, of course, was I think that was after summary judgment. Aren't you trying to rush things by trying to get me to say, on a motion to dismiss, to apply "per se?"

MR. BARNETT: I wouldn't want to rush you, but I believe we -- I think we have cited from authority that suggests even if the motion to dismiss stage, it is appropriate to dismiss a "per se" client if it does not look like the facts are going to support that kind of claim.

Let me turn briefly to the tortious interference claim. I don't think this is particularly complicated from our perspective.

They were serving false and deceptive ads. They were harming our users. The complaint itself includes articles that suggest 20 percent of these offer ads were fraudulent, "were willfully tricking users" is the phrase in the article.

Facebook clearly has the right to defend the integrity of its site and to protect its users. That is what it did. It cited the reasons for doing so. And it informed the developer community that needed to know. That is all it did. Under those circumstances, they have not

set forth a claim for tortious interference. And,

Then as a final point, I would mention the issues cited in the November 12, 2009 letter from Kickflip to Facebook which is one of the letters that they have challenged in the motion to strike.

I think you know the basic facts. You know as much as we know in that they suggest, they represent that they did that with the Kickflip or Gambit business that was at issue. And so if that letter is in, they have not responded to that. They merely say we misunderstood it. If the letter is not in, and you don't think you can get to that, then we would suggest limited discovery on that point.

THE COURT: Let's talk on the motion to strike, whether it's in. It's an interesting concept to me that they rely clearly on one letter, and then I think it's undisputed that the letter you want to rely on is a response to that letter.

MR. BARNETT: Correct.

THE COURT: You are not arguing I don't think that their claim relies on their responsive letter, so it's sort of a completeness argument, but I'm not sure that that gets it in on a motion to dismiss. So I'm struggling with that.

MR. BARNETT: Well, I would say it depends on what one means on by "rely." In terms of particularly on

tortious interference and the claim that this was somehow a sham, that exchange establishes the basis of what Kickflip told -- I'm sorry -- what Facebook told Kickflip and what Kickflip informed Facebook in terms of they didn't deny they were doing what we asserted they were doing and we proceeded ahead with the ban.

And a suggestion that this was a sham and not based on this, I do think that entire exchange between the two is relevant. If you look at it, I think you were alluding to this, it's not a situation where they didn't have access to it. So there is no unfairness prong on that front. They have selectively quoted, if you will, from one side of the exchange and not from the other. But I would ultimately base the argument on the idea that it is relevant to their assertion that this was a sham, this was not the reason we did it, because it gives you the information available to Facebook at the time.

THE COURT: You mentioned that Apple, in passing, addressed in the motion to strike context, whether it's appropriate for me to look at the Apple documents given they're just referenced really in passing in the complaint.

MR. BARNETT: I could be wrong. I don't think we attached Apple documents. I think there were a couple of statements in the motion to dismiss.

THE COURT: I think you might be right about that.

MR. BARNETT: They referenced the fact that the payment processing policy is basically identical to or follows the model that Apple has. And we may have used the phrase "standard in the industry." The complaint itself alleges that we follow the Apple model in this regard. And so that is all that is intended.

If you want to substitute the statement from the complaint for that statement in the motion to dismiss and limit it to that point, we have no objection to that.

THE COURT: On your policies which we talked about way back at the beginning of your argument, I remember now one of the arguments you're getting is that there is a lack of authentication, no affidavit or anything. What is the response on that?

MR. BARNETT: Yes. Well, there are two sets of policies. One was a set of policies at the time the complaint was filed. They have not asserted a lack of authentication for those policies, nor have they suggested that there is anything wrong or unauthentic about them.

When they raise the issue of, well, these were not the policies necessarily in effect in July of 2011, we submitted the policies as they existed at that point in time. From my perspective, there is not a declaration. If that were the only barrier, that would be helpful, we could submit a declaration, but there is not.

From my perspective, the appropriate thing to do is to focus on the policies that were in place at the URL at the time they filed the complaint which were the same as the time we filed the motion to dismiss because that is what is cited in the complaint, and it's reasonable to read the complaint that is challenging the policy that was available at the URL cited in the complaint.

THE COURT: I think we've reached the time where we're getting into your rebuttal time.

MR. BARNETT: Okay. Thank you.

THE COURT: Thank you.

MR. NEWMAN: Your Honor, I'd like to discuss three issues.

THE COURT: Okay.

MR. NEWMAN: First, that Kickflip has standing.

Second, how Kickflip properly pled the antitrust relevant markets and virtual-currency services and social media network. And,

Third, that Kickflip properly pled each of its substantive causes of action for monopolization, tie-in and tortious interference.

I'll start with standing. Standing has three elements:

An injury,

Causal connection between that injury and harm

that is alleged to have been committed by the defendant. And,

Third, the likelihood that the Court can redress the injury.

The first two, injury and causal connection, I think is clear from the complaint. The complaint alleges that Facebook engaged in a monopolistic scheme to eliminate competition in the virtual-currency services market.

The scheme began in May of 2009 when Facebook launched its credits product to compete against Kickflip and 20 other competitors and did so at a 30 percent fee even though all the other competitors were charging 5 or 10 percent.

The complaint says that, unsurprisingly, Facebook was unable to gain market share because of that price and because it offered less services. So it set out of a course of action to eliminate competition, the first step of which was banning Kickflip. And the complaint explains why.

It says that Kickflip has customers like Playdom, Zynga, and Crowd Star. It's Facebook who was courting those players at the time and thereby eliminating Kickflip, the second largest virtual-service provider, Facebook was free to move in and consummate deals with those parties.

So there is an injury, and there is a causal connection pled.

Facebook, though, contends there may not be standing for the antitrust claim. Facebook concedes their standing for tortious interference and contends that occurred in 2009, but if there was antitrust violation it occurred in 2011.

The complaint which the Court must rely on and draw all of these reasonable inferences in favor of the complaint -- in favor of the plaintiff, says otherwise. The complaint says there was a monopolistic scheme, an anti-trust violation that began in 2009 and culminated in 2011. It was one event. It occurred over a two-year period. The complaint goes into detail about how it began with Facebook entering the market, how it eliminated Kickflip. How it then converted certain high game dollar competitors like Zynga and then later, after building infrastructure, it eliminated all competition. It was all one act.

But even assuming that Facebook was correct and it was two acts, the Court should look at the Third Circuit case, *Khodara v Blakey*. In that case, Khodara was a land developer and Khodara wanted to develop land near an airport but the State of Pennsylvania revoked his permits so they couldn't develop. That occurred in 1996. Four years later, in the year 2000, the FAA passed a regulation eliminating everybody from developing near the airport.

Khodara sued on both violations and the court

turned to the third prong of standing which is likelihood of redressing injury, and the Court found that it could not redress the 1996 injury without also dealing with the 2000 injury and similarly couldn't redress the 2000 injury without dealing with the 1996 injury. So even if they were two separate injuries, *Khodara* has standing. That is the concept that Facebook refers to known as causal overdetermination where there is two independent obstacles. The plaintiff has standing to sue on both.

There is a third reason why Kickflip has standing. We would urge the Court to follow the Fifth Circuit case of *Hayes v Solomon* which found even if a business is not engaged, it has antitrust standing if it has the intent and the preparedness to enter the market.

Kickflip clearly has the intent. It's suing for an injunction for the right to enter the market and it's prepared. The complaint discusses how Kickflip was the second largest provider of virtual-currency services. How it had customers and generated tens of millions dollars in revenue. It had employees, contracts, infrastructure. The complaint calls it an innovator. For those reasons, Kickflip has standing.

THE COURT: All right. Let's talk about a few of those things.

So what I can I rely on in the complaint to show

preparedness going forward? This case isn't over today, it's not going to be over tomorrow unless it's dismissed. So all the things you talked about are history and, in this market, kind of ancient history. So on what basis could I conclude you are prepared to reenter?

MR. NEWMAN: The Court has to draw all reasonable inferences in favor of the plaintiff, Kickflip. And it's reasonable to infer from the complaint and the facts that are alleged that since Kickflip has a history of developing the business through innovation and technology and infrastructure and contracts and relationships and success, it's reasonable to infer that based upon that, Kickflip is prepared to move forward.

THE COURT: There is nothing else in the complaint except your history; correct? On preparedness.

MR. NEWMAN: The complaint discusses in detail the history because as of today, Kickflip no longer has a business since Facebook eliminated all competition.

THE COURT: All right. And you are relying on the Fifth Circuit decision, I think it's called *Hayes*. Is there anything in the Third Circuit that could show or that I could rely on for intent and preparedness being adequate?

MR. NEWMAN: There aren't any Third Circuit cases with that standard, so I have argued that there are three reasons why Kickflip has standing.

The first is it's one injury that occurred over a two-year period.

The second is even if there are two injuries, this Court must rely on the Third Circuit case of *Khodara v Blakey*. And,

The third reason is in the event the Court is unpersuaded by the first two, we urge the Court to follow the Fifth Circuit case.

But the answer to Your Honor's question is there is not a Third Circuit case that holds the same.

THE COURT: Let's talk about *Khodara*, which is the Third Circuit case, and its application here.

Help me understand how that does apply. Let's say at the end of the day, you prove that the 2011 policy is monopolistic and unlawful but you were properly banned in 2009 for a violation of the advertisement policies. How would such a decision in any way redress the injury to you all?

MR. NEWMAN: Well Your Honor raises a hypothetical. Namely, we've gone through discovery, gone through summary judgment and trial, and the Court finds there was an antitrust violation but there wasn't tortious interference. And under that circumstance, perhaps Facebook would then be able to prohibit Kickflip from reentering the platform. But the complaint, and that is what the Court

must rely on today, alleges that Facebook did it without any justification and that there is mere pretext. That it was motivated by an anticompetitive animus, and that it used this so-called Scamville controversy as an excuse and wrongfully interfered with Kickflip's relationships.

So for purposes of today and whether to allow the claim to move forward, the Court has to accept all well pled allegations as true and as long as it's plausible that Kickflip will prove those facts that I just stated, the Court has to deny Facebook's motion.

But to answer Your Honor's question, in the event that Facebook brings forth evidence and shows that it was rightful as opposed to wrongful, then it wins that portion of the tortious interference claim. And Your Honor is correct that Kickflip would not have a remedy under those circumstances, which I'm confident will not arise since we're familiar with the facts of the case.

So having discussed standing, I'll move to my second point which is that Kickflip properly identified the antitrust markets: social game network and virtual-currency services.

When looking at a relevant product market, the Court has to undertake a factual inquiry into the commercial realities of the consumer. Here, the consumer is the game developer. We know this because the complaint expressly

pleads its developer is the consumer, and because it was the developer who required a social game network in order to publish its games, and it was the developer who engaged in virtual-currency services in order to monetize the game. And when looking at whether there is a market, the Third Circuit requires a test of reasonable interchangeability of use and cross-elasticity of demand for the product and substitutes for it.

I think the case that best discusses it is *Queen City Pizza* v *Domino's Pizza*. In that case, the court went through a detailed analysis discussing those two tests and with respect to reasonable interchangeability and cross-elasticity, the court gave an example. If consumers need to move, any transportation, well, a consumer can use a Ford, but Ford isn't a market because consumer can also use a Chevy. And for short range transportation, well, the consumer can buy a horse or go on a bicycle. So they could all potentially be in the same market.

Cross-elasticity of demand is another way of measuring it. That's the proposition that if price goes up on one item in the market, then demand goes up for another item in the market. Kickflip has defined its markets with respect to interchangeability of use and cross-elasticity of demand.

I'll start with the social game network.

Kickflip's complaint pleads expressly that no other game market is interchangeable with the social game network. The reason for it, and Kickflip's complaint goes into detail, is a social game network provides a developer with ready access to millions of players and allows the developer to tap into their existing social network.

There is a distinct economic model that the complaint discusses about how the developer makes money in the social gaming community. The developer spends very little to create its game and earns very little per user. So the way that it earns a living is based on the scale that is only available with a social game network. And the complaint discusses that a social game developer cannot sell games at the corner store or the stand-alone website or mobile device. The complaint expressly says that the only market for a social game developer is the social game network.

And it gives a great example, Zynga. Zynga is the world's largest social game developer. The complaint discusses that Zynga did a billion dollars of revenue. It's a publicly traded corporation. Because of that, it probably has a lot of power and leverage, but yet when Facebook demanded that "Zynga pay the 30 percent fee or that Facebook would ban Zynga games altogether," which is a direct quote from a complaint, Zynga succumbed and paid the 30 percent fee even though it stated it would harm the business.

Why? Because even though Zynga is huge and has substantial resources, a social game on a social game network is different from other games which makes the social game network its own market for antitrust purposes. And that 30 percent fee illustrates cross-elasticity of demand. Zynga had nowhere else to go. The complaint does the same with respect to virtual-currency services.

THE COURT: Before you move on to that, do you allege even with respect to Zynga that their games are not available elsewhere through other platforms?

MR. NEWMAN: The complaint doesn't discuss that, but I'm happy to address the facts in real life if the Court would like.

THE COURT: Well, you can do that in a second, but first tell me for purposes of the issue I have in front of me, can I draw that inference in your favor? Do I have to draw that inference in your favor?

MR. NEWMAN: Yes. The Court can draw and must draw that inference in favor of Kickflip because the standard is the Court must draw all well pled inferences in favor of the plaintiff and determine whether it's plausible that the facts as stated are correct. And,

Here, the complaint discusses in detail that Zynga is the world's largest social game developer, that it requires a social game network. And then when Facebook said

that it would ban Zynga's games altogether, Zynga agreed to pay the fee even though Zynga publicly stated that that would harm its business.

THE COURT: So specifically I can and must infer that Zynga's game offerings are not available anywhere else other than Facebook?

MR. NEWMAN: Yes. And if the Court would like me to discuss outside the complaint, I'm happy to answer the question.

THE COURT: Well, only in regard to if I were to allow an amended pleading, you can represent that you would have a good faith basis to more explicitly make that sort of allegation.

MR. NEWMAN: Yes. But, Your Honor, there is no reason to require an amended pleading because all the facts are there. The additional pleading that we would make is Zynga has tried a stand-alone website that was unsuccessful because it requires a social game network and that Zynga tried to make money through mobile that was unsuccessful. These are all public facts. It's a publicly traded corporation. The news business report is the same.

Those facts are unnecessary for the purposes of pleading because this is about the social game network. It's not about stand-alone websites, it's not about mobile, and the complaint expressly explains why. Because the

developer is unable to rely on that distinct economic model, generate revenue through those means. It's a separate antitrust market. The complaint explains why. So amending the complaint would be superfluous.

THE COURT: Now, the inference includes the inference that one can't play the Zynga game through Google+ and through MySpace and through other social networks; correct?

MR. NEWMAN: No, Your Honor. The complaint expressly says there are competitive social game networks, but Facebook has a dominant share of social game networks.

THE COURT: Is that alleged?

MR. NEWMAN: It is. The complaint alleges that Facebook has a 90 percent share of social game networks and discusses that the developer needs Facebook because when it's left with just a ten percent, the competitors like Google+, MySpace, and others is unable to earn a living of because of Facebook's dominate share in the market. So while there are competitors, the developer needs Facebook because Facebook has that 90 percent share and growing.

THE COURT: And that 90 percent share is alleged as of the date of the complaint?

MR. NEWMAN: It is. And Your Honor can draw a reasonable inference that even back in 2009, there was an intent to monopolize because the jurisprudence finds that

when you look at the relevant market today, it shows that there was an intent to monopolize back then. And if the Court were to review the complaint and just search for 90 percent, the Court will find several references to it showing that Facebook has a dominant share of the social game network. And,

Similarly with the virtual-currency service market which Kickflip also plead with respect to interchangable of use and cross-elasticity of demand, the complaint discusses in several places that virtual-currency services is a cluster where the virtual-currency service provider provides in-game rewards for developers. It connects advertising with payment processing. It provides customer service, data analytics, fraud prevention and assist the developers in monetizing their games. The complaint expressly says "there are no substitutes" and it then explains why. Because the only way a social game developer can generate revenue is through the sale of virtual-currency services.

Before Facebook eliminated all competition, there was a robust and competitive market where developers had a selection of 20 different virtual-currency service providers all competing based upon price and service. Price was generally at 5 percent or 10 percent commission. It wasn't until Facebook came in that anyone thought of offering a 30 percent commission.

The complaint names the competitors specifically. It talks about the Metrics and TrialPay and Offerpal and SuperRewards and talks about a vibrant and competitive marketplace where these virtual-currency service providers were innovative, trying to out-compete one another and that there were several hundred million dollars in revenue that were generated in the market before Facebook eliminated all competition and capture that revenue for itself. And,

Cross-elasticity of demand is mentioned to the extent that in the complaint at one time, the complaint alleges, that virtual-currency services providers charged 5 or 10 percent. Facebook came in and charged 30 percent and the consumer, the developer, didn't use Facebook services. Facebook could not compete on the merits, but when Facebook eliminated all competition, at that point, because there was no other alternative, because the virtual-currency is not interchangeable with anything else, the developer was forced to use Facebook's product.

Facebook contends that this is about payment processing, and it cites examples like PayPal. This is not about payment processing. Even though Facebook may repeat that, the complaint alleges otherwise, and the Court must rely on the complaint.

PayPal doesn't provide in-game rewards or

customer service for game players or data analytics or fraud prevention. It doesn't provide any advertising services. This isn't about payment processing. The complaint discusses credits, a competitive virtual-currency service provider that Facebook owned and required its game developer customers to use or at least required them not to use any competitive virtual-currency.

So we've established standing and the proper antitrust markets which leads me to my third point of discussion, namely, that Kickflip has properly pled each of its claims.

THE COURT: All right. Let's talk about the virtual-currency market first before you move on to that.

Should I, does one reasonably infer that Facebook offered that whole cluster of services that you say defines, if I'm following correctly, the virtual-currency market?

MR. NEWMAN: Yes. The complaint states that Facebook is in the virtual-currency services market but the complaint also states that Facebook offered less services than its competitors. So the core of virtual-currency services providing in-game rewards, connecting advertising and payment processing. The complaint notes that Facebook credits provide no services, but the complaint also notes Facebook provided less services than its competitors. It

was able to do that because it monopolized the market which is the first claim that Kickflip pleads.

In order to plead a claim for monopoly, Kickflip has to show that Facebook had a dominant market share and created a monopoly. And it did. It alleges a 90 percent market share on virtual-currency services and that Facebook acquired that monopoly by way of willful acquisition as distinguished from growth from a superior product, business acumen or historic accident, and the complaint discusses those.

The complaint says Facebook intended to eliminate competition and that is how it acquired the market. It wasn't a superior product. The complaint discusses expressly that Facebook's product was inferior, higher prices, less services. It wasn't as a result of innovation or business acumen. The complaint says expressly that the competitive market, the vibrant and competitive market of virtual-currency service providers, they were innovators. The complaint calls them pioneers and says that Facebook did not develop.

So Kickflip has properly plead its monopolization claim.

Similarly, it pled a time claim. Time is an agreement where a company will provide one product known as the timing product only on the condition that its customer accept the second product known as the tied product, or at

least that the customer will not buy the tied product from anyone else. The essence of an illegal time is when the company that is providing these products has a dominant market share and the time market and exploits control over that time market in order to force customers to buy the tied product or at least not to buy it from another source.

In this case, the complaint alleges that Facebook had a 90 percent market share in the social gaming network market and that it exploited its control over that market in order to force developers to use Facebook credits or at least not to use virtual-currency from any other source, such as Kickflip, SuperRewards, TrialPay, Offerpal, Simetrics are some of the other competitors that are mentioned in the complaint. So Kickflip has pled tying.

THE COURT: So the tying is, to use what it already has, monopoly in one of your markets, to extend that to your other market?

MR. NEWMAN: Precisely. Time is having control over one market.

THE COURT: But I mean you specifically are alleging -- because you are alleging two markets here; correct?

MR. NEWMAN: Yes.

THE COURT: And your allegation for tying is that they exploited their monopoly power in one of the

markets you pled, the social game network, into the other market you pled, the virtual-currency services market. Do I understand that correctly?

MR. NEWMAN: Yes, but there is a distinction. The complaint concedes that Facebook acquired its power in the social game network market legitimately through competition on the merits. There, it was an innovator. But with respect to virtual-currency services, Facebook did not. It wasn't an innovator. It eliminated all competition by exploiting control over that social network game market in order to gain control over the tied market which is virtual-currency services and consequently eliminated all competition, not through competition on the merits but through exploitation of control and, because of that, there is tying.

Facebook asks this Court to apply a rule of reason analysis instead of a per se analysis when analyzing tie in. But the Court doesn't need to reach a conclusion today which standard it will apply and the reason for that is because the difference of rule of reason and per se is rule of reason allows the Court to consider facts that weigh in favor of the defendant's pro-competitive justification.

But the complaint pleads, and the Court must rely on the allegations in the complaint, that Facebook had no pro-competitive justifications. And the complaint

describes that once there was a vibrant competitive marketplace or virtual-currency providers. That Facebook eliminated all competition. That prices went up for developers. That virtual-currency service providers went out of business. That those developers now paying the 30 percent fee have to pass it along to their end consumers, the players, and the competition was harmed.

So because there are these allegations that there aren't any pro-competitive justifications, the Court does not have to decide today whether to apply per se or rule of reason standard. And we would suggest that the Court should not, because there should be a detailed factual record about the technology at issue which could assist the Court in determining which standard is proper. But for purposes of the motion to dismiss, the complaint has all allegations necessary for the Court to conclude that the tie-in existed. And,

Kickflip pled a claim for tortious interference. Tortious interference requires a wrongful interference with a contract. The complaint pleads that Facebook interfered with the contract because it was hoping to eliminate all competition. That the so-called Scamville controversy was mere pretext and that Facebook did so without justification.

Even if Facebook has a good reason, it still must be the least restrictive alternative to withstand scrutiny

for tortious interference and an antitrust violation. And the complaint notes that Facebook had other alternatives and thus acted without justification.

So Kickflip has properly pled a claim for monopolization, tie-in, and tortious interference. As standing, to properly define the market, it pled each of its causes of action, and this Court should deny Facebook's motion to dismiss.

I believe I have remaining time; and I would appreciate if I could respond to additional points that Facebook may make.

THE COURT: Well, possibly but let me have you respond to some questions from me.

MR. NEWMAN: Please.

THE COURT: What about Gambit?

MR. NEWMAN: You are talking about the standing issue?

THE COURT: Well, I think that is where it comes up, but what is your relationship with Gambit and shouldn't we get to the bottom of that?

MR. NEWMAN: Of course. The complaint reads, that Gambit is a d/b/a for Kickflip. Kickflip did business as Gambit. And, Kickflip's registration with the State of Delaware is active and in good standing.

Kickflip did -- and this is not in the

complaint, nor it needed to be. This is perhaps a defense that Facebook could try and prove later, but this isn't necessary for the Court to deny the motion to dismiss. Kickflip created a wholly owned subsidiary and spun off some, but not all, of its business operations. Kickflip expressly held in its parent corporation the causes of action that it is raising today and Gambitland, which is a subsidiary, was ultimately absorbed back into Kickflip.

So Kickflip, even though it spun off some but not all of it corporations, has all the operations in the parent. There is only now one company. That's Kickflip Games, the plaintiff, which always has done business with Gambit. And that is the reason why the complaint refers to it as Gambit.

THE COURT: So why shouldn't we have discovery and hold you to your burden on that, now that has been put in dispute at this point?

MR. NEWMAN: Well, the Court should not limit discovery to the standing issue. I believe during this motion to dismiss, Facebook has alleged all kinds of defenses that it has. That is one. Because I know the facts and I have spoken with my client, I know that Facebook isn't going to succeed on that defense any more than it would succeed on whether it had justification for banning Kickflip.

I don't think the Court should limit discovery whether it has justification either. I think the Court should allow the case to proceed, discovery will open, Facebook could serve discovery requests on the standing issue, and then ultimately Facebook will be convinced. And I anticipate that at summary judgment, that won't even be an issue because the facts are clear that Kickflip is one company that did business as Gambit and that it has standing to bring the claims that it does today.

THE COURT: On the record that I have in front of me, must I conclude that Kickflip was involved in serving ads that were misleading, fraudulent or otherwise in violation of Facebook's policies?

MR. NEWMAN: No. On page 9 of the complaint, Kickflip discusses and pleads expressly that it vigorously monitored ads, and that it was not serving improper ads. It was for that reason that it was especially surprising that Facebook picked on Kickflip. And the complaint discusses that the reason Facebook did that is because Kickflip had contracts with customers who Facebook was courting. And that since Facebook was able to eliminate Kickflip, it could take a substantial step forward in monopolizing the entire market, which is a scheme it had developed in 2009 and completed by 2011. And,

I would add an additional point. I answered

the Court's question but I would note that even in the event that Kickflip did serve improper ads, the complaint expressly pleads that virtual-currency service providers all did, including Facebook's own credits. And that by eliminating Kickflip, Facebook did not help the problem because there are other virtual-currency service providers, including credit itself and the unwanted ads remained. It was mere pretext by eliminating Kickflip, and there were least restrictive alternatives that Facebook could have taken and the law requires them to take the least restrictive alternatives in order to avoid the claims that Kickflip brings today.

THE COURT: Didn't you argue in your brief, though, that Kickflip did not monitor ads?

MR. NEWMAN: No, Your Honor. That is a misstatement that Facebook made. The complaint expressly says that it was the virtual-currency currency providers who did not monitor ads. It was speaking generally in with respect to the industry and Kickflip, as the complaint says, aggressively monitored ads.

The opposition doesn't say otherwise. The opposition just points out that Facebook shouldn't eliminate any single virtual-currency service providers because they're not responsible for monitoring ads. Rather, Facebook could have gone after the advertisers or gone after the developers

who could control the ads that the developers served. But the opposition has nothing that is inconsistent with the complaint. The complaint speaks generally about virtual-currency service providers and the opposition points that out.

If the Court reviews the opposition, the Court will see that it doesn't say that Kickflip didn't monitor ads. It says the opposite.

THE COURT: What about the attachment to the complaint? One of the articles, I believe it is Exhibit 6, seems to have your client confirm that it did serve noncompliant ads. Do I take that as true?

MR. NEWMAN: No, Your Honor. We structure this complaint somewhat unconventionally where we had footnotes citing to articles. Those articles aren't facts that we're pleading and those aren't evidence. We did that because we wanted to provide context in case the Court wanted to look further into the allegations that were made.

We're not relying on those articles. We're just noting that a lot of the facts that we're stating are public. It's public that there was a vibrant and competitive marketplace. It's public that Facebook decided to eliminate all competition. It's public as the Court can read in the articles that the core developers and the core virtual-currency service providers anticipate that Facebook may do it.

That was anticipated in 2009, and it ultimately

culminated in 2011. And then Facebook said we didn't intend to monopolize the market, but the articles show that everybody was concerned about it as early as 2009.

We're not relying on those articles. We're just providing context. Later, Facebook and Kickflip will submit evidence to try to prove whichever facts weigh in favor of the respective party. But those articles aren't evidence.

THE COURT: But you attached them to the complaint, so can I consider them on a motion to dismiss or not?

MR. NEWMAN: No, because the complaint doesn't say "attached as an exhibit is an article and we rely on each of the facts incorporated by reference." The facts are pled expressly, and then to support some of the facts there might be a citation from an article so that the Court could gain greater context.

THE COURT: Is there anything in your motion to strike or any of the briefing that would have told me that you think I can't rely on, for instance, this article that's specifically attached to the complaint?

MR. NEWMAN: Yes. Your Honor, in the motion to strike, Kickflip cites the applicable legal standard which is that it has to be integral to the allegations in the complaint. And it explains in the motion how none of those articles were integral to the allegations in the complaint.

But I take it a step further and I would note that even if the Court disagrees with me and decides that it has to consider all of those articles, that doesn't change the fact that Kickflip pleads that it was mere pretext. Kickflip's complaint acknowledges that there were improper ads and says all the virtual-currency services providers and Facebook itself served the improper ads. And so even if the Court assumes those articles are true and that Kickflip did it, that doesn't mean that Facebook did not act out of an anticompetitive animus and that its actions were mere pretext without legitimate justification and that there were least restrictive alternatives. There were less restrictive alternatives. So even if you assume those claims are true, Kickflip proper plead the claim and the Court should deny the motion to dismiss.

THE COURT: Well, I'm getting a little confused by your position. Because as I read your motion to strike, you listed specifically what it was you didn't want the Court to consider, and it's only a few exhibits and a few statements in the brief.

Should I now understand that you think I can't consider all of these things that are attached to your complaint?

MR. NEWMAN: Your Honor must rely on the motion that we made and we ask to strike specific items, I agree,

but I was responding to the Court's question whether the Court could consider the articles. The Court can't consider the articles because they're not actual allegations.

THE COURT: Cannot?

MR. NEWMAN: Cannot, and they're not allegations.

THE COURT: I think you further told me that I should have understood that from your briefing. You are not now saying that, are you?

MR. NEWMAN: I regret if I said something inconsistent with the briefing. We stand by the briefs. I would just note that the Court understands the standard, and that the articles aren't evidence and they're not factual allegations, and even if they are, the Court should still come to the same conclusion.

THE COURT: Well, I think this is a pretty important point because you are arguing pretext.

MR. NEWMAN: Yes.

THE COURT: Do I have to find that it's at least a reasonable inference and a plausible allegation that what was happening in 2009 was part of a pretext for a monopolization scheme in order for you to prevail on a motion to dismiss?

MR. NEWMAN: No. The Court has to find that the complaint pleads that there was a scheme to monopolize and that the excuse that the defendant makes was mere pretext.

THE COURT: All right. So in that regard, isn't it pretty important for me to know? Because as you point out, I'm not a fact-finder at this point, but you all did make allegations and you did attach articles. From how I read it coming in here today, you never suggested before a few moments ago that I couldn't look at those articles on the motion to dismiss in trying to determine if you have plausible and reasonably alleged pretext. It seems to me whether or not I can look at those articles or not may have a big impact. So your position is I cannot.

MR. NEWMAN: No, our position is not that the Court should not look at the articles. Our position is that the articles are not substantive allegations pled. And,

Second, that even if they were, the Court should not weigh facts. So the Court shouldn't look at those articles and decide, well, here it says that the virtual-currency service providers were serving bad ads and I'll weigh that against all the other allegations in the complaint. The Court can't do that, and because of it whether the Court considers it or not, the same conclusion arises.

We cited those articles in our complaint because we wanted to provide context. So contrary to the Court shouldn't look at the articles, we would encourage the Court to look at everything, but we didn't rely on those articles. Those aren't our pleadings.

If the Court finds otherwise, well, the Court shouldn't be weighing facts and thus the Court should allow the case to proceed so that Facebook can prove the facts in those articles that are in its favor and Kickflip will prove the facts in its favor.

THE COURT: At this stage of the proceedings, how do I decide that you are not an admitted violator of the term in 2009?

MR. NEWMAN: By reading the complaint that says, on page 9, that Kickflip wasn't serving improper ads when it was working cooperatively with Facebook to prevent unwanted ads, and that Facebook acted abruptly and arbitrarily to eliminate Kickflip. And,

The Court shouldn't be weighing facts. Even if Kickflip was an admitted violator, Facebook acted without justification because there were less restrictive alternatives. And as the Court knows, there probably isn't an antitrust case or tortious interference case in history where the defendant doesn't have some excuse. The defendant always says I did it because I have justification and that requires fact-finding and a weighing of facts. That's not appropriate at the motion to dismiss stage. It's not even appropriate for summary judgment.

So here, Kickflip could very well be an admitted violator but if Facebook acted without justification or

under pretext because of an anticompetitive animus, Kickflip wins.

THE COURT: And on your motion to strike, let's talk about the cease-and-desist letter and your response to it. First off, I guess I need to confirm do you rely on the cease-and-desist letter? Is that something proper for the Court to consider on this motion to strike?

MR. NEWMAN: We rely on the fact that the cease-and-desist letter was sent but not that the facts stated in the cease-and-desist letter are true. And,

Similarly, the letter in response is without context. Kickflip was being banned from the Facebook platform. Its business was eviscerated. That is what the victim's complaint alleges. So Kickflip has to do something to try and win Facebook's goodwill. So it sent a letter saying we really want to work with you. It didn't make any excuses, and it didn't state the facts that were in its favor because it didn't want to offend Kickflip.

Now, that is outside the complaint, what I just said, but those are the facts that will have proven later after discovery. Facebook will take Kickflip's discovery deposition and say why did you say this and why didn't you say that? And,

Kickflip similarly will take Facebook's deposition and ask upon what basis did you have a right to

ban Kickflip when it had no impact on the controversy that you said occurred? That even though you banned Kickflip there is still unwanted ads. That Facebook itself was serving unwanted ads. And we'll ask Facebook, how was it this wasn't a wrongful interference when it had no impact on the integrity of the system that you claimed to protect?

These are factual questions. They develop them discovery. If the record is in dispute at summary judgment, then the Court can rule. If not, these go to a jury. But for purposes of a motion to dismiss, the Court must draw all inferences in favor of the plaintiff; and even if Kickflip served unwanted ads, that doesn't mean that it doesn't win at the end.

THE COURT: I understand you draw all reasonable inferences. I think my question is why can't I look, in determining what the reasonable inferences are to be drawn in your favor, why can't I look at your own letter responding to a letter that your complaint relies on?

MR. NEWMAN: The Court can look at any of the materials here. If I was the Judge, I would look at all of them, too. But the Court can only rely on the factual allegations in the complaint. The letter doesn't contain factual allegations. The allegation that the letter was sent, that is the allegation, not that the facts that contain them are true. They provide factual issues that the

parties will resolve, but those facts are not allegations pled.

THE COURT: All right. You do have about 20 minutes left. I'll let you reserve five minutes of it, if you want. Though I will give Facebook the chance, if they have time left, to have the last word, but you also can talk for 20 more minutes now if you want to. But you have answered my question.

MR. NEWMAN: I will yield anything more than that to the bench, and I'm grateful for the five minutes.

THE COURT: Okay. Great. Thank you.

We'll hear from Facebook. You have about 12 minutes left. And if you want to save any of it to have the last word, you can do so.

MR. BARNETT: If can save three minutes, that would be great.

THE COURT: Okay.

MR. BARNETT: I guess several points to emphasize here.

In terms of the points you were discussing with counsel for plaintiff at the end about of what happens if they serve fraudulent ads? First of all, I will say that I've read the complaint multiple times. I just re-read page 9. I see no denial that they ever served fraudulent or deceptive ads. They say they were trying to work

cooperatively but that is different.

THE COURT: They say you acted arbitrarily. Doesn't that, if I draw everything in their favor, suggest they're perfectly innocent?

MR. BARNETT: No. Well, they say something slightly different, I think. They're trying to say that others were bad, too.

In the particular instance where you are serving fraudulent deceptive ads, I don't know that it's particularly compelling defense to say that others rely on the users as well. And we would suggest that as under the facts as alleged in the complaint and incorporated, and the standard I believe is explicitly referenced or integral to the complaint.

"Integral" tends to deal with where it is not referenced but they're just, they're trying to prevent the Court from seeing an underlying court document such as the policies in this instance.

But they explicitly referenced these articles. And given the lack of a denial and the specific allegations in the November 5th letter that is referenced in their complaint, I don't see how the Court can approach this motion without understanding that Kickflip was serving fraudulent and deceptive ads. And,

Under those circumstances, I come back to

Twombly. In order -- and as the Court is probably aware, we're not supposed to federalize the law of tort by making everything an antitrust claim. There needs to be specific allegations that suggest there is a linkage between their ban and this supposed antitrust scheme. And as we have gone through before and I won't go through again, we think the linkage that they have given here is inherently deficient.

We're dealing with advertising, and they're challenging a payment processing policy. Those things are very distinct, and I just won't repeat my efforts there.

I will also note I believe counsel acknowledged that if you find they do not have a tortious interference claim, their antitrust standing falls out the window.

Now, he said it turns on the end at the case, if we lose on the tortious interference, then maybe Facebook has a reason for kicking out the antitrust claim on standing grounds. But if you find they have failed to state a claim for tortious interference at this point, I would also suggest, based on their being banned in 2009, that that underscores, that is an independent reason, why they're not on Facebook suggests that any remedy in the antitrust case would not redress their situation because we would continue to have an independent reason to ban them from the site which is because they were serving fraudulent and deceptive ads.

I wanted to go to the antitrust allegations a little bit. And they're, with respect, being a bit fast and loose on some of what they're alleging.

Let me go to the virtual-currency market. Your Honor asked the question, well, is Facebook in the virtual-currency market? Well, yes, but it's supposedly a cluster market, meaning you have to sell the cluster to be viable in a cluster market. That's the whole point.

But when you ask him, does Facebook provide all of those other services? He acknowledged that they don't, which shows there is an inherent contradiction here in terms of what is the relevant market.

Now, he said each of these element is not interchangeable. That is a different point from saying they have to be sold in a group.

I'm not sure I accept -- I don't accept that they're not interchangeable with payment processing sold elsewhere. But there are no facts that suggests that the only way game developers buy these is in this one entire group. And, indeed, they acknowledge there is at least one provider, if not others, who don't provide the whole group. That just shows the incoherence of this virtual-currency.

THE COURT: But they are arguing that one provider that can get away with that is Facebook and it's because you are a monopoly. That is in the article.

MR. BARNETT: Fair enough. But even setting that aside for a moment, what are the facts that say as a game developer, I will only buy payment processing from somebody who also does offer ads or pricing monetization, optimization customer ads, those sorts of things? There are not facts alleged that indicate you have to only buy those things in a group from one provider.

And you come back to the policy that they have challenged only addresses payment processing. They have not alleged who is providing in-app currency on Facebook games today. Do they allege the percentage of games on Facebook that use Facebook credits? They don't. That's a telling omission. Do they allege who provides pricing optimization services? They don't. That is a telling omission.

Go through the who provides offer ads. They don't allege anything about what is happening today on Facebook in terms of games and who is providing all of these service that are at issue. That kind of monopolization claim, that is a fairly fundamental position. It's fairly important.

Also, on the same point, the 90 percent share, they don't tell you what the share was back in 2009. They don't allege or talk about the fact that MySpace, for example, was a very prominent social networking site, similar size, and they don't suggest that Facebook had

dominance at that point in time or even was close to achieving dominance at that point in time.

THE COURT: That is not even a reasonable inference to draw?

MR. BARNETT: It's a very dynamic industry in terms of what is true in 2013 versus what is true in 2009 and somebody who adopts a policy, if you will, when they are not dominant tends to be doing it for legitimate business reasons.

THE COURT: Right.

MR. BARNETT: I'm just pointing out that the facts that they alleged, they very carefully alleged this in 2013. They have not alleged what was going on back in 2009.

Kickflip itself, they have not, they have never alleged how much of its business was dependent upon games on Facebook. There is a lot of atmospherics around that but they don't allege it. And,

You go back to the articles. I believe this is Exhibit 7 to the motion to dismiss. Another article referenced in the complaint that they have not moved to strike. And it says specifically that Kickflip Gambit has a strong business on other platforms.

This goes to the notion that selling to game developers just on Facebook is not a coherent relevant market. That fact is before you, legitimate to consider,

but they have alleged nothing that explains how that business was or why that shouldn't be considered as part of the market.

I want to mention -- oh. In the opposition, on tying. An alternative way of accessing Facebook without being subject to the payment processing policy. They didn't address that at all. If you had an alternative, that undercuts the tie-in claim.

Again, when you come back to consistency, and it being clear about what is going on, are they responsible for monitoring ads? Are they not responsible for monitoring ads? I think I heard sort of two different answers to that, and the fact that they were involved in ads is I think not really seriously in dispute. On the one hand, when it is convenient, they want to run from that. On the other hand, they acknowledge it.

I think what I want to come back to, and I will, other than my two minutes I will leave at the end of the day, unless you have further questions, is this complaint in my mind is not coherent. It's important both in terms of ensuring that there is a plausible claim and in terms of reasonable structure of litigation going forward. Even if you were ultimately, for example, to grant it, they were to amend, and if it survived you have a more focused litigation.

There is a benefit to requiring them to step up

to the plate and articulate a coherent theory with facts to support it, if they can do so. I would suggest that that is well worth doing in this context.

THE COURT: Okay. We'll save two minutes for you. Thank you.

MR. NEWMAN: Your Honor, I cited page 9 when I should have cited page 10.

THE COURT: Of the complaint?

MR. NEWMAN: Yes, Your Honor. I will read that paragraph just so that the Court has it.

The paragraph on page 10 that I'm referring to says:

"Facebook targeted Gambit because it wanted to tarnish the reputation of Gambit and the virtual-currency industry to create the perception that Facebook needed to step in with a safe alternative to allegedly problematic virtual-currency services provided by others. Gambit, widely recognized as one of the good guys in the industry who did not use such ads, did not fit with the story-line Facebook wanted to foster, so Facebook used the Scamville controversy as pretext to destroy Gambit's relationships with developers and preemptively eliminate Gambit from the market."

So I wanted to correct myself and read the paragraph on page 10.

I also wanted to point out that complaint pleads several times that Kickflip did not create those ads and that the developers delivered the ads. So Facebook had less restrictive alternatives. And then,

Finally, with respect to the cluster market. The complaint does allege that Facebook was in the virtual-currency services market, and the fact that it may have offered less services doesn't change the fact it was in the market.

An example I would give is banks. Some banks offer safety deposit boxes. Some do not. Some offer only business checking while others will also offer personal checking. The fact there are services that are more or less the same, even if one competitor offers less or more, doesn't mean they're any less in the same market.

And if the Court has no further questions?

THE COURT: Just one. What about this point about the alternative ways of accessing Facebook and there are some ways allegedly where you don't need to use credits? How does that fit in?

MR. NEWMAN: Your Honor, there that is a red herring. I'm familiar with the log-in and plug-in that counsel refers to. The complaint does not discuss them. That is not accepting the social gaming network. That is accessing other features of Facebook that don't come into

play with respect to the allegations in the complaint because social game developers aren't using those in the way the complaint discusses. It's a separate feature.

For example, I am a member of the Wall Street Journal website, and I have the option of logging in with my Wall Street Journal user password, or I can use a Facebook user password. That's the example of the Facebook log-in, but that has nothing to do with the social gaming network.

Thank you.

THE COURT: Okay. Thank you very much.

MR. BARNETT: Your Honor, very quickly. It's important. I want to be precise.

I appreciate counsel pointing me to the other page. And I read this sentence. I read it several times. It doesn't actually say that they didn't serve fraudulent ads. It says they were widely recognized as one of the good guys in the industry who did not use such ads. So they very carefully wording this to say, they avoid the Rule 11 issue by not saying we didn't serve scammy ads. They said others may not have thought that we served scammy ads.

But Facebook had direct access to the information. The November 5th letter goes directly to that point. And I would suggest such an artfully crafted sentence in the complaint does not eliminate the obvious proposition that they were serving fraudulent deceptive ads.

On the log-ins, first of all, by definition we're outside the complaint. He acknowledges the complaint doesn't deal with this issue. But it is in the policies that say you can access it through this other means. You are not subject to the payment processing policy.

So if he thinks that they're not adequate, the complaint again needs to address obvious alternatives, that would mean that there is no tie. He is actually -- if we're going to step outside a little bit, he is wrong in the sense that it doesn't affect what goes on with the social networking.

When you are inside a game, you are playing the game. You may be playing with other people, and that is true whether the game is on Facebook or Xbox or a website or whatever. That is the functionality inside the game.

The socializing aspect, to the extent there is one, is letting your friends know that I'm on Farmville or I did such-and-such. Publishing as an example is one of the things that is expressly permitted by the policy for people accessing off the site.

I only use it as an illustration that there is a burden on the plaintiff to allege facts that suggest that this is not an adequate alternative. Since by omission they don't even address it, they could not have alleged facts that meet that burden.

THE COURT: Well, I thank you very much. I thank both sides for helpful argument. And we will take the issues under advisement. We will be in recess.

(Hearing ends at 11:56 a.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court